

2-1-1991

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Recommended Citation

Stephen A. Rosenbaum, *Pro Bono Publico Meets Droits de L'homme: Speaking a New Legal Language*, 13 Loy. L.A. Int'l & Comp. L. Rev. 499 (1991).

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Pro Bono Publico Meets Droits de L'homme: Speaking a New Legal Language

STEPHEN A. ROSENBAUM*

I. INTRODUCTION

The Legal Services Office, a fixture of urban neighborhoods and rural towns, does not fit the mold of the typical international human rights organization.¹ Staffed by attorneys and paraprofessionals, these relatively autonomous law firms represent the United States' poor in virtually all legal matters outside of the criminal justice system. Although lacking a membership base or a high-profile secretariat, these offices may contribute as much as any nongovernmental organization ("NGO")² to the resolution of human rights concerns.

Unlike their colleagues in the private bar, legal aid lawyers do not request a fee from their clients.³ Although the government usu-

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1. Typical organizations include: Amnesty International, Defence for Children International, Disabled People International, Helsinki Watch, Human Rights Advocates, Inc., International Committee of the Red Cross, International Indian Treaty Council, International League for Human Rights, and Minority Rights Group.

2. These offices were established and funded under the Legal Services Corporation Act, § 2, Pub. L. No. 93-355, 88 Stat. 388 (1974) (codified as amended at 42 U.S.C. § 2996 (1988)). For a history of the Legal Services program, see generally Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Caplan, *Understanding the Controversy Over the Legal Services Corporation*, 28 N.Y.L. SCH. L. REV. 583 (1983); Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981); B. GARTH, *NEIGHBORHOOD LAW FIRMS FOR THE POOR* 15-48 (1980); E. JOHNSON, JR., *JUSTICE & REFORM: THE FORMATIVE YEARS OF THE LEGAL SERVICES PROGRAM* (1974); Pye, *The Role of Legal Services in the Antipoverty Program*, 31 L. & CONTEMP. PROBS. 211 (1966); H. STUMPF, *COMMUNITY POLITICS & LEGAL SERVICES: THE OTHER SIDE OF THE LAW* (1975); and Handler, *United States of America*, in *PERSPECTIVES IN LEGAL AID: AN INTERNATIONAL SURVEY* 318, 326-35 (F. Zemans 1979).

3. 42 U.S.C. § 2996f(b)(1) (1988); 45 C.F.R. § 1609 (1989).

ally pays the bulk of their salaries, they do not work *for* the government. Their objective, like any attorney's, is to provide the best representation possible.

Much debate exists about how best to serve legal aid clients. Legislators and the board of directors of the legal services parent agency have imposed many limitations on the kinds of assistance that these lawyers can provide.⁴ Despite disagreements and obstacles, these firms have the potential for concerted creative lawyering. This Article examines ways that legal aid advocates can utilize international human rights doctrine to advance the interests of poor and disadvantaged Americans. This Article is intended as a sympathetic account of some encounters by Legal Services lawyers within this evolving area of law: what works and what does not.⁵

The first section describes briefly the history and structure of the United States legal aid program. Section two details practical reasons why attorneys may want to look to international instruments or forums to achieve their clients' objectives and to satisfy the bureaucratic limitations imposed by the Legal Services Corporation ("LSC").⁶ The third section provides synopses of actual cases, both closed and pending, in which legal aid lawyers asserted international law. The final

4. See, e.g., 42 U.S.C. § 2996e(d)-(e), f(b); 45 C.F.R. §§ 1608-10, 1612-13, 1615, 1617, 1626; Draft Minutes of Legal Services Corporation Board of Directors, Jan. 27, 1989 (on file with the Loyola of Los Angeles International and Comparative Law Journal); Agenda of Legal Services Corporation Board of Directors Meeting, Mar. 2-3, 1989 (on file with the Loyola of Los Angeles International and Comparative Law Journal); see also 54 Fed. Reg. 31,954-59 (restrictions on the use of Legal Services Corporation funds for voter redistricting cases).

5. This Article does not provide a detailed explanation of the instruments and procedures used in international human rights forums, nor an analysis of whether domestic application of international law is preferable to filing cases in international human rights forums. For a discussion of these topics, see M.E. TARDU & T.E. MCCARTHY, *Complaint Procedures of the United Nations Organization*, in 2 HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM, (1985); GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (H. Hannum 1984); Burke, Coliver, de la Vega & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983); Christenson, *The Use of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741 (1985); Hoffman, *Symposium on International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61 (1984); *Proceedings: Conference on International Human Rights Law in State and Federal Courts*, 17 U.S.F. L. REV. 1 (1982) [hereinafter *Proceedings*]; de la Vega, *Using International Human Rights Law in Legal Services Cases*, 22 CLEARINGHOUSE REV. 1242 (1989); Note, *The Domestic Application of International Human Rights Law: Evolving the Species*, 5 HASTINGS INT'L & COMP. L. REV. 161, 162-200 (1981) [hereinafter *Domestic Application*]; and Note, *Enforcement of International Human Rights in the Federal Courts After Filartiga v. Pena-Irala*, 67 VA. L. REV. 1379, 1385-93 (1981).

6. See sources cited *supra* note 4.

section discusses some high points and hazards facing the practitioner. This Article provides observations on strategy and style as well as forum and form for those who seek to combine the interests of poverty lawyer and international human rights advocate.

II. HISTORY OF LEGAL AID IN THE UNITED STATES

Legal aid to the poor dates as far back in the Anglo-American legal system as the Magna Carta.⁷ Yet it was not until the middle of this century that the concept became something more than a noble objective subscribed to by members of the bar.⁸

The founding of legal aid societies affiliated with local bar associations in the early 1900s marked the recognition in the United States of each attorney's duty to work *pro bono publico*.⁹ The American Bar Association championed the cause in the 1920s.¹⁰ In 1965, President Lyndon Johnson's War on Poverty spawned the Legal Services program—a government-funded battalion of storefront lawyers. These lawyers represented the poor on civil matters under the auspices of the federal Office of Economic Opportunity ("OEO").¹¹ By 1972, six hundred law offices served the indigent throughout the United States.¹²

The Legal Services program encouraged lawyers to "design new social, legal, and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition."¹³ This large attorney corps battled the enemies of tenants,

7. See E. JOHNSON, JR., *supra* note 2, at 3 (quoting the Magna Carta (1215) and the Statute of Henry VII (1495) for the English principle that poor litigants should receive free counsel).

8. B. GARTH, *supra* note 2, at 20-21.

9. "For the public good . . ." BLACK'S LAW DICTIONARY 1083 (5th ed. 1979). The first legal aid organization in the United States was the *Deutscher Rechtsschutz Verein*, established in 1876 for German immigrants in New York City. B. GARTH, *supra* note 2, at 17-18. The *pro bono* obligation has since been formalized. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 to -29; MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) ("A lawyer should render public legal service" at no fee or reduced fee, to persons of limited means or to charitable groups or in some other form of public service or improvement of the law or legal profession.).

10. B. GARTH, *supra* note 2, at 18.

11. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964). For a history of the OEO program, see B. GARTH, *supra* note 2, at 26-29 and E. JOHNSON, JR., *supra* note 2.

12. H. STUMPF, *supra* note 2, at 138, table 4. The number of Legal Services offices peaked in 1972 with 2,000 attorneys staffing 280 separately funded projects nationwide. Handler, *supra* note 2, at 329.

13. H. STUMPF, *supra* note 2, at 143 (quoting E. Clinton Bamberger, Jr., Director of the

debtors, elderly patients, unpaid workers, unhappy spouses, expelled students, and others. These battles occurred in state and federal courts and before boards of education, labor commissioners, welfare department hearing officers, and administrative law judges. This war primarily utilized statutes, regulations, and court cases as its "tools and vehicles."

By the early 1970s, Legal Services attorneys were effective enough to alienate local politicians, members of Congress, and President Richard Nixon. As a result, Congress implemented major changes to the program, restricting services to the most controversial clients—those seeking to obtain abortions, desegregate schools, organize laborers, and resist military conscription.¹⁴ Congress next removed the program from the executive branch and established the quasi-independent LSC.¹⁵ President Ronald Reagan's administration and the conservative Congress that accompanied him into office imposed further restrictions. These included: prohibitions on the advocacy of gay rights and representation of undocumented immigrants; limitations on the lobbying of legislatures and regulatory bodies; and obstacles to class action lawsuits.¹⁶

Despite these restrictions, Legal Services lawyers have developed new approaches to meet the legal needs of the poor in the latter part of this century.¹⁷ One new approach for *pro bono* lawyers involves international human rights law and procedure. The two principal ways to involve international law and procedures are to apply them in domestic forums and to file complaints with international bodies concerned with human rights.

III. DOMESTIC APPLICATION

There are several ways that the use of international law in domestic legal arenas can enhance Legal Services objectives. First, lan-

OEO Legal Services Program, addressing the National Conference of Bar Presidents, Chicago, Ill., Feb. 19, 1966).

14. 42 U.S.C. § 2996e(d)(5), f(b)(6)-(10); 45 C.F.R. 1608, 1610.

15. 42 U.S.C. § 2996b.

16. Pub. L. No. 96-536, 94 Stat. 3166 (1980); Pub. L. No. 97-377, 96 Stat. 1874 (1977); 45 C.F.R. 1612, 1617, 1626.

17. See, e.g., Dooley & Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, 15 CLEARINGHOUSE REV. 704, 717 (1982); National Legal Aid & Defender Ass'n and Project Advisory Group, *Future Challenges: A Planning Document for Legal Services*, 22 CLEARINGHOUSE REV. 628 (1988) [hereinafter NLADA]. The need for scholars and advocates to think creatively is particularly acute during an era of judicial restraint. See Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L. REV. 1 (1983).

guage contained in various international human rights instruments can help reinforce a number of traditional poverty-law causes such as increased employment,¹⁸ sexual equality,¹⁹ child nutrition,²⁰ improved education for immigrant children,²¹ indigenous peoples' treaty rights,²² and adequately funded health care.²³ Such instruments include the Universal Declaration of Human Rights,²⁴ International Human Rights Covenants,²⁵ the American Declaration of the Rights and Duties of Man,²⁶ the American Convention on Human Rights,²⁷ other international accords,²⁸ and the case law interpreting these

18. See, e.g., ILO Convention No. 122 (Convention Concerning Employment Policy, July 9, 1964), reprinted in INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS & RECOMMENDATIONS, 1919-1981 67 (1982) [hereinafter ILO].

19. See, e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; Coliver, *United Nations Machinery on Women's Rights: How Might They Better Help Women Whose Rights are Being Violated?*, in NEW DIRECTIONS IN HUMAN RIGHTS 25 (E. Lutz, H. Hannum & K. Burke 1989).

20. See, e.g., Declaration on the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) (Principles 2, 4) at 19, U.N. Doc. A/4354 (1959), reprinted in UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 57 (1984); Draft Convention on the Rights of the Child, arts. 24(2), 27(3), E/CN.4/1989/29 (1989).

21. See, e.g., *In re Alien Children Litigation*, 501 F. Supp. 544, 589-96 (S.D. Tex. 1980), *aff'd on other grounds*, Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982); Protocol of Buenos Aires, Feb. 27, 1967, art. 7, 21 U.S.T. 607, T.I.A.S. No. 6847.

22. See, e.g., ILO Convention No. 107 (Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Peoples in Independent Countries, June 26, 1957), reprinted in ILO, *supra* note 18, at 858; Hannum, *The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples, and the Right to Autonomy*, in NEW DIRECTIONS IN HUMAN RIGHTS 16 (E. Lutz, H. Hannum & K. Burke 1989).

23. See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts. 11-12, 993 U.N.T.S. 1; see also Barrett & Youells, *The Statewide Poor People's Platform Congress: Building Coalitions for Social Justice*, 14 CLEARINGHOUSE REV. 1168, 1172 (1981); Dooley & Houseman, *supra* note 17; NLADA, *supra* note 17; D. TRUBEK, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE THIRD WORLD 232-42 (1983); de la Vega, *supra* note 5, at 1247-54; Note, *Domestic Application*, *supra* note 5, at 175-76.

24. Universal Declaration of Human Rights, G.A. Res. 217 A (III) at 71, U.N. Doc. A/810 (1948), reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 440.1 (1986).

25. International Covenant on Economic, Social and Cultural Rights, *supra* note 23; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

26. American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/ser.L/V/II.23, doc. 21, rev. 6 (1946), reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 430.1 [hereinafter American Declaration]. See especially articles XII (right to education), XIV (right to work and fair remuneration), XVI (right to social security) and XI (right to preservation of health and well-being).

27. American Convention on Human Rights, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/ser.L/V/II.23, doc. 21, rev. 2 (1969), reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 190.1. See especially articles 5 (right to humane treatment), 17 (rights of the family), 19 (rights of the child), and 26 (economic, social and cultural rights).

28. See, e.g., Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N.

documents.

Second, Legal Services staff can teach lay advocates and grass-roots organizations about international human rights. A trend toward community legal education has been developing in LSC circles and among lawyers' associations generally.²⁹ Amendments to the Legal Services Corporation Act require local offices to train eligible clients and provide support services for "significant segments" of the client population.³⁰ Many legal aid offices and bar associations have designed workshops, forums, and other projects to benefit tenants, consumers, welfare recipients, immigrants, and other members of the public.³¹ These projects aim to teach people about their rights before

GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975), *reprinted in* UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 131 (1984); Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971), *reprinted in* UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 117 (1984); Declaration on the Rights of the Child, *supra* note 20; Draft Convention on the Rights of the Child, *supra* note 20; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 4, 1969, 660 U.N.T.S. 195.

The phrase "international human rights law" embraces more than the key United Nations instruments or the so-called "International Bill of Human Rights." See *Proceedings*, *supra* note 5, at 3 (remarks of Professor Frank C. Newman); Hoffman, *supra* note 5, at 62. The beginning of a codified international human rights law may be found in the *Déclaration des droits de l'homme et du citoyen du 26 août 1789* (Declaration of the Rights of Man and of the Citizen of August 26, 1789), *Petits Codes Dalloz: Code Administratif*, *reprinted in* FRENCH LAW: CONSTITUTION & SELECTIVE LEGISLATION 2-3 to -5 (G. Bermann, H. de Vries, N. Galston 1988). This popular declaration embodies fundamental rights such as equality, political access, freedom of opinion and communication, rights during arrest and detention, and rights against the deprivation of property. These are the so-called "general principles" of contemporary French constitutional law and the foundation of much international human rights law. See L. BROWN & J.F. GARNER, FRENCH ADMINISTRATIVE LAW 112-14 (1967).

29. "Outreach" through the use of community aides to educate the poor about their legal rights distinguished the OEO program from its legal aid precursor. Pye, *supra* note 2, at 245-48. For a discussion of community education strategies and experience, see J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 161, 181-82 (1978); Houseman, *Community Group Action: Legal Services, Poor People and Community Groups*, 19 CLEARINGHOUSE REV. 392 (1985); and B. GARTH, *supra* note 2, at 194-98. For a discussion of activities that help individuals to represent themselves or that demystify the law and the legal profession, see J. MATTHEWS & D. MATTHEWS BERMAN, SOCIAL SECURITY, MEDICARE AND PENSIONS (1990); M. MOSKOVITZ & R. WARNER, TENANTS' RIGHTS (1990); Joselson & Kaye, *Pro Se Divorce: A Strategy for Empowering Women*, 1 J. L. & INEQUALITY 239 (1983); Neiman, *Volunteer Legal Services Program*, S.F. ATT'Y, Aug.-Sept. 1988, at 25-26; Schardein, *Lawyers-in-the-Classroom*, S.F. ATT'Y, Dec. 1988-Jan. 1989, at 25.

30. 42 U.S.C. § 2996f(a)(2)(C).

31. See, e.g., Youells, *Designing A Low-Cost Community Legal Education Project*, 14 CLEARINGHOUSE REV. 446 (1980); *Strengthening Resources Through Preventive Law: A Concept for the Future*, 13 CLEARINGHOUSE REV. 605 (1979) (describing a street law project in

a legal problem occurs, much like doctors and public health officials might teach preventative medicine. For example, presentations to parents' groups could educate people about the inter-American or universal human rights principles that support their children's right to an education or to instruction in their native language. Welfare rights organizations might be interested in disseminating information about the economic guarantees enunciated in the International Covenants³² or the American Convention.³³ These presentations could coincide with lawsuits raising the same issues in United States courts.

Finally, legal aid offices can use human rights law to involve the private bar. There is an increasing interest in human rights law among private practitioners, public interest attorneys, and academics. Federal regulations require law offices operating on LSC grants to devote at least 12.5% of their budgets to "private attorney involvement" in the delivery of legal services.³⁴ This involvement may come in the form of training, technical assistance, research, or community legal education.³⁵

Under LSC guidelines, the legal aid office must also make an effort to involve private attorneys in "new or unique areas of law."³⁶ By promoting the use of international human rights norms in the legal services arena, legal aid offices would certainly be following these guidelines. Furthermore, the resulting lawyer-to-lawyer exchanges necessary for training, technical assistance, and research would promote international human rights and simultaneously meet a bureaucratic goal.

New York); *Community Legal Education in Minneapolis*, 13 CLEARINGHOUSE REV. 605 (1979) (describing a public meeting series in Minneapolis). For an example of a lay manual for use in a particular subject area, see S. Rosenbaum, Training Manual for District Bilingual Education Advisory Committees in California, (Oct. 1983 draft) (on file with the Loyola of Los Angeles International and Comparative Law Journal); see also Joseph, *Pro Bono Legalization Project*, S.F. ATT'Y, Aug.-Sept. 1988, 27 (describing the Pro Bono Legalization Project sponsored by the Bar Association of San Francisco); Neiman, *supra* note 29, at 25-26 (describing the Income Rights Project and the General Assistance Advocacy Project of San Francisco; the Cooperative Restraining Order Clinic for Battered Women, AIDS Panel, and Homeless Advocacy Project).

32. See sources cited *supra* notes 23, 25.

33. American Convention, *supra* note 27.

34. Programs must devote 12.5% of their budgets to this kind of involvement. 45 C.F.R. § 1614.1(a). For a history of private attorney involvement, see E. JOHNSON, JR., *supra* note 2, at 117-21, and for a discussion of its value, see Brakel, *Prospects of Private Bar Involvement in Legal Services*, 66 A.B.A. J. 726 (1980) and Dooley & Houseman, *supra* note 17, at 713 & n.35.

35. 45 C.F.R. § 1614.3(b)(1).

36. *Id.* § 1614.3(c)(5).

IV. INTERNATIONAL COMPLAINT PROCEDURES

There is no single required format for filing complaints with most international and regional bodies. Each tribunal has adopted procedures that mirror the language of the conventions that authorized their creation.³⁷ There are no rules of court and no customary practices for stating a claim for relief or writing a memorandum of law.

International bodies that receive human rights complaints do not base their decisions on precedent. Officially reported decisions with an analysis and holding are rare. At best, the international body issues a broadly worded resolution that calls upon a government to take certain steps or makes reference to the article that has been breached by the offending state party.³⁸

However, legal advocacy is not out of place or less rigorous than in United States forums. When presenting a petition that alleges human rights violations to an international body, an attorney must set forth fully supporting factual and legal arguments. This may be done with more freedom of form and style than is usually acceptable to United States judges or administrative tribunals. In many instances, those who review the human rights complaint will not be jurists or trained in the common law. Instead, the reviewing panel likely will be composed of persons schooled in diplomacy, philosophy, political science, or a civil law system.³⁹

37. See, e.g., GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 5, at 59-219; HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM Pt. I, Ch. VIII, booklet 9 (T. Buergenthal & R. Norris 1984) [hereinafter T. Buergenthal & R. Norris]; *id.* booklet 9.1 (1986); Alston, *UNESCO's Procedure for Dealing with Human Rights Violations*, 20 SANTA CLARA L. REV. 665 (1980); Landy, *The Implementation Procedures of the International Labor Organization*, 20 SANTA CLARA L. REV. 633 (1980); Norris, *Bringing Human Rights Petitions Before the Inter-American Commission*, 20 SANTA CLARA L. REV. 733 (1980); Tardu, *United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 SANTA CLARA L. REV. 559 (1980).

38. See, e.g., Inter-American Commission on Human Rights ("IACHR") Annual Report for 1982-83, O.A.S. Doc. OEA/ser.L/V/II.61, doc. 22, rev. 1 (1983), *reprinted in* T. Buergenthal & R. Norris, *supra* note 37, booklet 24.1, at 14-15; IACHR Annual Report for 1985-86, O.A.S. Doc. OEA/ser.L/V/II.68, doc. 8, rev. 1 (1986), *reprinted in* T. Buergenthal & R. Norris, *supra* note 37, booklet 24.2, at 1; *see also* Commission on Human Rights Res. 33, U.N. ESCOR, Supp. (No. 3) 194, U.N. Doc. E/1980/13, E/CN.4/1408; *but see* Landy, *supra* note 37, at 652 (discussing the ILO Governing Body's publication of report on discrimination violations in Czechoslovakia).

39. See, e.g., Regulations of the IACHR (1985), art. 1(3), O.A.S. Doc. OEA/ser.L/V/II.65, doc. 6, *reprinted in* T. Buergenthal & R. Norris, *supra* note 37, booklet 9.1, at 1 (IACHR requirement that members, elected in their individual capacity, must be "persons of high moral standing and recognized competence in the field of human rights"); *see also* Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of

The petition process generally is less expensive than litigation filed in United States courts.⁴⁰ There are no filing fees, and unless the petition leads to a hearing or on-site investigation, there are no travel expenses or fees for witnesses, court reporters, or interpreters.

The petition process affects domestic legislative or administrative decisions to the extent that international commissions compel governments to change laws or policies. The present Legal Services Act and accompanying regulations severely hamper this influence on legislation and rule-making in the United States.⁴¹ Legal aid offices may not lobby unless they are specifically invited to do so by a legislator or administrator, or do so on behalf of a particular client.⁴²

Within these parameters, legal aid offices may indirectly influence public policy through the international petition process, because the restrictions speak only to advocacy before *domestic* entities and elected officials at the *national* and *local* level. By addressing a communication to one of the *international* human rights bodies, a lawyer may achieve the same impact as if he or she were testifying before a congressional committee, writing a letter to a state senator, or commenting on regulations proposed by the State Department. Such activities are otherwise barred by the Legal Services Act.⁴³

Another advantage of the international petition system is that most international bodies grant complaining parties broad standing. For example, under the American Convention on Human Rights, "[a]ny person or group of persons, or any [legally recognized] non-governmental entity" may lodge petitions with the Inter-American Commission on Human Rights ("IACHR") containing denunciations or complaints of violations of the convention or its parent document,

any disputes which may arise between States Parties to the Convention against Discrimination in Education, art. 2(1), reprinted in UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 68 (1984) (UNESCO Conciliation and Good Offices Commission criteria that members be "persons of high moral standing and acknowledged impartiality").

40. See *Proceedings*, *supra* note 5, at 53 (remarks of international law practitioner and scholar Hurst Hannum on the costs of litigation).

41. 45 C.F.R. §§ 1612.3-4.

42. *Id.* § 1612.1, 4-7. For a discussion of the early debate on legislative and administrative lobbying by Legal Services attorneys, see E. JOHNSON, JR., *supra* note 2, at 260-67. For arguments in favor of and against such lobbying, see Note, *Special Project: The Legal Services Corporation: Past, Present and Future?*, 28 N.Y.L. SCH. L. REV. 593, 679-83 (1983) and Comment, *Pulling the Reins on Legal Services Lobbying*, 9 HARV. J.L. & PUB. POL'Y 203 (1986).

43. 42 U.S.C. § 2996e(c)(2).

the American Declaration, on behalf of themselves or third parties.⁴⁴ Economic and Social Council ("ECOSOC") Resolution 1503 sets forth procedures by which the United Nations Sub-Commission receives communications.⁴⁵ Resolution 1503 allows a person or group "who ha[s] direct and reliable knowledge" of gross violations of the United Nations Charter, the Universal Declaration of Human Rights, and other international instruments to file complaints with the Sub-Commission.⁴⁶ Thus, parties may bring violations before international human rights forums more easily than before the United States courts. This broad standing allows greater representation of under-represented groups, such as undocumented immigrants, whose access to legal assistance has been substantially reduced by legislative restrictions in the last decade.⁴⁷

The petition procedure allows relief for a large number of persons without the strict requirements found in the LSC regulations or the federal and state rules for certifying a class.⁴⁸ The Sub-Commission's Resolution 1503 procedure, by definition, favors complaints of "gross violations." Such complaints usually result from a government's repeated or massive violations that affect large numbers of persons.⁴⁹ The United Nations Educational, Scientific and Cultural Organization ("UNESCO") distinguishes between "cases" and "ques-

44. O.A.S. Doc. OEA/ser.L/V/II.49, doc. 6, rev. 4 (1985). For a general discussion of standing before the IACHR, see Norris, *supra*, note 37, at 738-39.

45. The Sub-Commission is a subsidiary body of the United Nations Commission on Human Rights that receives and processes complaints regarding human rights violations. Tardu, *supra* note 37, at 559-60.

46. NGOs may also file complaints with the Sub-Commission if they meet the above criteria and "act[] in good faith . . . not resorting to politically motivated stands." Sub-Commission Res. 1 (XXXIV) (1971) on Procedures for Admissibility Under Res. 1503, para. 1, 48 U.N. ESCOR, Supp. (No. 1A), 8 U.N. Doc. E/4832/Add. 1 (1970).

The United Nations Educational, Scientific, and Cultural Organization's ("UNESCO") standing requirements under its Executive Board human rights procedures are similar to the Sub-Commission's. UNESCO Doc. 104 EX/Dec. 3.3 (1978), adopted by the UNESCO Executive Board at its 104th session, establishing a Board Committee on Conventions and Recommendations. For a discussion of procedures in more detail, see Marks, *UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication*, 13 TEX. INT'L L.J. 35 (1977); Alston, *supra* note 37, at 665; Marks, *The Complaint Procedures of the United Nations Educational, Scientific and Cultural Organization (UNESCO)*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 94 (H. Hannum 1984); M.E. TARDU & T.E. MCCARTHY, *supra* note 5, pt. II.

47. See, e.g., Pub. L. No. 97-377, 96 Stat. 1874 (1977); 45 C.F.R. § 1626.

48. See, e.g., 45 C.F.R. § 1617; FED. R. CIV. P. 23; CAL. CIV. PROC. CODE § 382 (West 1973); see also Houseman, *supra* note 29, at 399.

49. See Sub-Commission Res. 1, *supra* note 46; Tardu, *supra* note 37, at 582-85 (regarding gross violations).

tions" in its procedure for receiving communications involving violations in the fields of education, science, culture, and information.⁵⁰ "Cases" concern individual and specific rights violations, whereas "questions" involve a state policy of violating human rights or an accumulation of individual cases forming a "consistent pattern."⁵¹

The IACHR procedure, which provides for on-site investigations, also is suitable for petitions necessitating class-based relief. IACHR observers have noted a developing doctrine within the commission of more readily granting jurisdiction over "general" cases, that is, in instances where a pattern or practice of violations has been alleged.⁵² Therefore, mechanisms already exist for these forums to handle complaints affecting large numbers of persons who are similarly affected by a law or government practice.

None of these petitions or complaints should be subject to LSC regulations or local board of director policies that require class action approval by a Legal Services executive director. Serving a broad class of people is within the original Legal Services mandate. The OEO's legal component was originally intended "to effect changes in laws and institutions which adversely and unfairly affect the poor."⁵³ Thus, the goal was to serve the poor as a group, not simply indigent clients on an individual basis.⁵⁴ The international accords reflect an interest in protecting the rights of groups, whether by fighting social oppression and racism or by organizing to promote cultural interests and better working conditions. The international forums offer complainants a flexibility often not available in United States judicial and administrative tribunals as well as a way around the bureaucratic obstacles of the Legal Services Corporation.

50. 104 EX/Dec. 3.3, paras. 16, 18.

51. *Id.*

52. See, e.g., Norris, *Observations In Loco: Practice and Procedures of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46, 93 (1980); T. Buergenthal & R. Norris, *supra* note 37, booklet 19, at 58, 72 (1983) (reporting IACHR Case 1683 investigating the assassination in Brazil of a São Paulo labor leader and Case 1684 investigating the murder of a Brazilian priest).

53. *Dep'ts of Labor, and Health, Education, and Welfare, and Related Agencies Appropriations for Fiscal Year 1971: Hearings on H.R. 18515 Before the Subcomm. of the Senate Comm. on Appropriations*, 91st Cong., 2d Sess., pt. 2, at 534 (1970).

54. H.R. Rep. No. 310, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4503, 4516. Congress did not intend to prohibit Legal Services staff from assisting or encouraging the formation of poor people's organizations "to foster just solutions to common problems." *Id.* See Cahn & Cahn, *supra* note 2, at 1024 on the historic and important role of lawyers in restructuring new organizations and enterprises.

V. CASE STUDIES: THE INTERNATIONAL APPROACH IN PRACTICE

The best way to illustrate how Legal Services practitioners may use international human rights law is to describe actual cases. Accounts of closed and pending cases follow.

A. *Detention, Due Process, Threats to Life and Security: Undocumented Migrants*

Between 1974 and 1982, ten undocumented immigrant farm workers in California drowned while being pursued by Immigration and Naturalization Service ("INS") agents.⁵⁵ During raids on agricultural land, agents utilized irrigation canals and natural waterways as barriers for rounding up the workers. For many farm workers, the water was the only perceived escape from apprehension, detention, and probable deportation.⁵⁶ A California affiliate of the Equal Rights Congress, a coalition of minority organizations, requested Legal Services attorneys to help notify Amnesty International following one of the latest drownings. California Rural Legal Assistance ("CRLA") and the Legal Aid Society of Alameda County ("LASAC") took the case, with help from Human Rights Advocates ("HRA") and two law professors.⁵⁷

Amnesty International's 1980 Annual Report mentioned the brutalities that United States law enforcement officials sometimes inflicted on undocumented workers.⁵⁸ After an exchange of letters with Amnesty's Secretariat,⁵⁹ Amnesty informed Legal Assistance that the

55. See, e.g., *Two Men Lost in American River*, Sacramento Union, Dec. 17, 1981; *Farm Worker Drowns Fleeing Border Patrol*, Stockton Record, Mar. 5, 1982, at 13; *Worker Found Dead After Fleeing Patrol*, Sacramento Bee, Aug. 8, 1982; *Mexican Farm Worker Drowns Escaping from Border Police*, Modesto Bee, Oct. 26, 1982, at A-1; *Bishop Wants FBI to Probe Deaths of Farm Workers*, Modesto Bee, Oct. 26, 1982; *INS Raids Drive Aliens to their Deaths*, Critics Say, San Jose Mercury News, Feb. 6, 1983, at 1A, col. 1.

56. See sources cited *supra* note 55.

57. The professors were Frank Newman, Ret. Justice (University of California, Berkeley (Boalt Hall)) and Dinah Shelton (Santa Clara University School of Law).

58. AMNESTY INTERNATIONAL REPORT 164 (1980). The report noted that "INS officials and Border Patrol agents behave with quite unnecessary rudeness and roughness in their dealings with undocumented workers. . . . Border Patrol agents are much more likely to use physical brutality when apprehending undocumented workers" *Id.*

59. CRLA's letter complained of violations of Universal Declaration of Human Rights articles 3 (right to life, liberty, and personal security); 5 (prohibition on cruel, inhuman, or degrading treatment or punishment); 7 (equal protection against discrimination); and 9 (prohibition of arbitrary arrest or detention). See Letter from Stephen Rosenbaum and Paulino García Olguín, California Rural Legal Assistance to Angela Wright, Amnesty International,

case did not fall within the scope of the organization's mandate.⁶⁰ However, the Secretariat did express an interest in receiving more documentation on the use of physical brutality by INS agents on undocumented workers and the ill-treatment of Mexican-Americans and other ethnic minorities in police custody.⁶¹ This interest was consistent with the concerns outlined in the Annual Report. The Secretariat's Americas specialist also indicated her willingness to discuss these issues personally during an upcoming visit to the United States.⁶²

Simultaneously, the Legal Aid Society attempted to bring the case before the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁶³ LASAC viewed the Sub-Commission as more favorable than the United Nations General Assembly working group drafting a convention on migrant workers' rights, because it was better suited to review ongoing violations. Since "migrant workers" were not on the Sub-Commission's 1983 agenda, the LASAC intervenor tried to relate the violations to the "detention" and "slavery-like practices" that were on the agenda.⁶⁴ The attorneys had to settle for oral interventions before the full Sub-Commission and working group because the staff and chair increasingly had been unreceptive to the more durable and detailed written submissions from participating NGOs.⁶⁵ Notwithstanding the medium of the interventions, the United States Observer at the Sub-Commission responded at great length. He did not deny the allegations, but instead

International Secretariat (Mar. 24, 1983) (on file with the Loyola of Los Angeles International and Comparative Law Journal); see also Letters from Angela Wright, Amnesty International, International Secretariat to Stephen Rosenbaum, California Rural Legal Assistance (May 11, 1983 & July 26, 1984) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

60. Letter from Angela Wright, Amnesty International, International Secretariat to Stephen Rosenbaum, California Rural Legal Assistance (May 11, 1983) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

61. *Id.*

62. *Id.*

63. See Tardu, *supra* note 37, at 566-78 on composition and procedures of the Sub-Commission.

64. Unpublished Memorandum from Connie de la Vega to Clifford Sweet, Executive Director, Legal Aid Society of Alameda County, at 2 (Sept. 16, 1983) (on file with the Loyola of Los Angeles International and Comparative Law Journal) [hereinafter Unpublished Memorandum]; see Van Boven, *Creative and Dynamic Strategies for Using United Nations Institutions and Procedures: The Frank Newman File*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 215 (E. Lutz, H. Hannum & K. Burke 1989) (United Nations procedures and Resolution 1503 in particular).

65. Unpublished Memorandum, *supra* note 64, at 2.

lavished praise on the president of the United Farm Workers Union in an effort to deflect the grievances raised about migrant worker mistreatment.⁶⁶

To keep the issue alive, the Legal Aid Society requested that ECOSOC publish a previously-prepared report on the exploitation of undocumented migrant laborers and solicit comments from governments, United Nations agencies, and NGOs. The Sub-Commission adopted a resolution requiring the Secretary-General to report on these comments and "other significant developments regarding the human rights of migrant workers" at the 1984 session of the Sub-Commission.⁶⁷ The Legal Aid Society's lobbying efforts seeking more explicit language on updating the report were unsuccessful.

The Secretary-General never prepared a substantive report. However, the General Assembly working group did issue several drafts of its proposed international convention on the rights of migrant workers and their families. The drafts include articles affirming the rights to life, liberty, and personal security of workers and their families; protection against violence, physical injury, threats, and intimidation; the right to due process if detained or arrested; and freedom from arbitrary arrest and detention.⁶⁸

On a third front, CRLA took the complaint to the Organization of American States ("OAS") Inter-American Commission on Human Rights, filing a petition in 1983 on behalf of the Equal Rights Congress ("ERC").⁶⁹ Since the United States has not ratified the American Convention on Human Rights, the ERC instead raised violations arising under the Declaration of the Rights and Duties of Man, most notably the rights to life, liberty, and personal security.⁷⁰ The petition also raised violations of humane treatment, due process, equal protection, civil rights, and the special protection of children.⁷¹ The petition

66. *Id.* at 3.

67. Draft Resolution submitted by Sub-Commissioners Daes and Whitaker, 36th Sess., U.N. Doc. E/CN.4/Sub.2/L.10 (1983).

68. See Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 41 U.N. ESCOR (3d mtg.) at 44, 45, 47, U.N. Doc. A/C.3 (1986); see also *Proceedings, supra* note 5, at 65-66 (opinion of human rights practitioner Michael Posner regarding the usefulness of advocacy on the subject of migrant worker treatment at the United Nations). Posner notes that the United States delegation is hostile to taking strong action. *Id.*

69. Petition to Inter-American Commission on Human Rights, *In re Drowning Deaths of Immigrant Workers*, esp. Margarito Lupercio (Apr. 7, 1983) (IACHR No. 9447).

70. *Id.* at 4-5.

71. *Id.* at 5-8.

sought a hearing and an on-site observation by commission members.⁷²

Because he anticipated objections to the admissibility of the petition, the ERC's lawyer met the issue head-on by arguing that the exhaustion of domestic remedies doctrine did not apply.⁷³ The OAS Secretariat initially refused to refer the petition to the commissioners, claiming that it was not admissible because not all domestic remedies had been invoked and exhausted.⁷⁴ Shortly after the 1983 session ended, the ERC learned that the case had been referred to a commissioner who would act as a rapporteur on the admissibility issue and report back to the full IACHR at its next session.⁷⁵ The commission did not transmit the petition to the United States for a reply until 1984.⁷⁶ The United States reply was serious and well-reasoned. Not surprisingly, the United States opposed admissibility, primarily because of two pending lawsuits that, if successful, would give the ERC the relief it sought, and one appeal that was not pursued in domestic courts. The government also alleged that the petition had no merit and failed to state a cause of action under the Inter-American Convention.⁷⁷ Relying on European Commission precedent, CRLA em-

72. *Id.* at 14.

73. *Id.* at 8-14; Letter from Stephen Rosenbaum to Edmundo Vargas Carreño, IACHR, OAS Executive Secretary (May 13, 1983) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

74. Letter from Edmundo Vargas Carreño, IACHR, OAS Executive Secretary to Stephen Rosenbaum (May 24, 1983) (on file with the Loyola of Los Angeles International and Comparative Law Journal). For a discussion of exhaustion under the Inter-American instruments, see Gros Espiell, *The Organization of American States (OAS)*, in *THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS* 554 n.34 (K. Vasak 1982); LeBlanc, *The Inter-American Commission on Human Rights*, 9 *REVUE DES DROITS DE L'HOMME/HUM. RTS J.* 645 (1979); Vargas Carreño, *Some Problems Presented by the Application and Interpretation of the American Convention on Human Rights*, 30 *AM. U.L. REV.* 127, 137-39 (1981).

75. Letter from Edmundo Vargas Carreño, IACHR, OAS Executive Secretary to Stephen Rosenbaum (Oct. 11, 1983) (informing that case assigned to Commissioner Andrés Aguilar as rapporteur at the 61st session of the IACHR) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

76. Letter from Edmundo Vargas Carreño, IACHR, OAS Executive Secretary to Stephen Rosenbaum (Oct. 24, 1984) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

77. Reply Letter from John J. Crowley, Jr., United States Deputy Permanent Representative to the O.A.S. to Edmundo Vargas Carreño (Feb. 27, 1985) (on file with the Loyola of Los Angeles International and Comparative Law Journal). *But see* IACHR Annual Report for 1986-87, O.A.S. Doc. OEA/serv. L/V/II.71, doc. 9, rev. 1 (1987), reprinted in T. Burgerthall & R. Norris, *supra* note 37, booklet 4, at 3 (*Disabled Peoples' International v. United States*, Case No. 9213, favorable decision on admissibility). Norris, an IACHR scholar, suggests that the burden is on the responding government to show that there has been no exhaustion. Norris, *supra* note 37, at 752.

phasized the "unwarranted delay" exception to rebut the exhaustion charge. It was necessary to utilize European Commission precedent because the Inter-American system is based largely on the European model and lacks extensive case law of its own. By focusing on the most serious violations of the hemispheric human rights accord—that the INS raids created a climate of fear by threatening the rights of life and security—the petitioner attempted to mitigate the stated and implied concerns of both the Secretariat and the United States government that the allegations were too tenuous.⁷⁸

In 1985, the commission passed a resolution denying admissibility on the ground that petitioners failed to state facts that constituted a violation under the Declaration. The resolution referred to the deaths as "regrettable" but said that they did not flow from INS policy or practice.⁷⁹ The ERC requested reconsideration⁸⁰ but the commission's answer remained the same.⁸¹

B. Maternity Leave: Working Women

In *California Federal Savings and Loan Association v. Guerra*,⁸² petitioner challenged a California statute requiring employers to grant pregnant employees a reasonable leave of absence. The Legal Aid Society of Alameda County, California filed an *amicus curiae* brief with the United States Supreme Court in support of respondent, an indigent mother seeking to return to her job after maternity leave.⁸³ The petitioner, respondent's employer, had claimed below that federal law

78. Observations in Response to Government's Reply, *In re Drowning Deaths of Immigrant Workers*, esp. Margarito Lupercio (May 3, 1985) (IACHR No. 9447); Letters from Stephen Rosenbaum to Dr. Andrés Aguilar (June 19, 1985 & June 25, 1985) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

79. IACHR Res. No. 3/85, O.A.S. Doc. OEA/ser.L/V/II.65, doc. 14 (1985), *reprinted in* T. Buergenthal & R. Norris, *supra* note 37, booklet 21.1, at 250 (1986) (the United States Commissioner abstained from voting).

80. Request for Reconsideration of Inadmissibility Declaration, *In re Drowning Deaths of Immigrant Workers*, esp. Margarito Lupercio (Sept. 10, 1985) (IACHR No. 9447).

81. Letter from Edmundo Vargas Carreño, IACHR, OAS Executive Secretary to Stephen Rosenbaum (Jan. 16, 1986) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

82. 479 U.S. 272 (1987).

83. Brief for Human Rights Advocates Inc. and Erika Smith as *Amici Curiae* In Support of Respondents, *California Fed'l Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494) (CLEARINGHOUSE REV. NO. 44, 143) [hereinafter *Amici Brief*]. Cleary, Gottlieb, Steen & Hamilton of New York, private attorneys for fellow *amicus* Human Rights Advocates ("HRA") joined the brief. In addition to lending their prestige to the case, the firm shared the significant printing costs and could have helped LASAC satisfy part of its obligation to involve private attorneys.

preempted the state law.⁸⁴ *Amici* argued that the Court should uphold the state statute because the statute was analogous to protection afforded under international law, as evidenced by such treaties as the International Covenants,⁸⁵ the Convention on the Elimination of All Forms of Discrimination Against Women,⁸⁶ International Labour Organisation Convention No. 103,⁸⁷ regional treaties of Africa, the Americas and Europe, and bylaws adopted in 127 nations.⁸⁸ *Amici* further urged that, wherever possible, courts should interpret federal statutes in a way that is consistent with international law.⁸⁹ They argued that the federal statute's legislative history supported this interpretation by specifically referring to international norms concerning maternity leave.⁹⁰

The Supreme Court upheld the state statute guaranteeing pregnancy leave.⁹¹ The Court's opinion did not refer directly to arguments raised by *amici*. However, it did note that the legislative history of the statute includes "extensive evidence of discrimination" by employers, especially in disability and health benefits for pregnant women and working mothers, and must not be read to preclude states

84. *Guerra*, 479 U.S. at 279.

85. International Covenant on Economic, Social and Cultural Rights, *supra* note 23, arts. 3, 7, 10(2); International Covenant on Civil and Political Rights, *supra* note 25, art. 3.

86. G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (1981), arts. 3 (equality of rights between men and women); 4(2) (protection of maternity without discrimination); 11(2) (prohibition of dismissal for pregnancy or maternity leave) (1980), *reprinted in* UNITED NATIONS CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 112-25 (1988).

87. ILO Convention No. 103 (Convention concerning Maternity Protection) *reprinted in* ILO, *supra* note 18, at 693. Articles 3 and 6 recognize the right to job-protected maternity leave with certain benefits. *Id.* at 694, 695.

88. *Amici* Brief, *supra* note 83, at 31-36; African Charter on Human and Peoples' Rights, Organization of African Unity, art. 18(3) (1981), *reprinted in* R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 530.4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221; WOMEN AT WORK, PROTECTION OF WORKING MOTHERS: ILO GLOBAL SURVEY 9-52 (1964-1984) (citing the laws of 127 nations).

89. *Amici* Brief, *supra* note 83, at 8.

90. *Id.* at 15-18; see *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 5, 23, 115, 290 (1977) (statements of Senator Jacob Javits, Senator Charles Mathias, Jr., Dr. André Hellegers, Wendy W. Williams, and Boris H. Block) [hereinafter *Hearings on S. 995*]; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 43-47, 53-56, 277 (1977) (statements of Dr. André Hellegers, Wendy W. Williams, and the American Nurses' Association).

91. *Guerra*, 479 U.S. at 292.

from adopting laws such as the challenged law.⁹² One footnote in the Court's discussion of the statute's legislative history referred to testimony in Congress that all European and most Western countries had enacted laws to provide income protection to working women with children and that the United States was virtually alone in not providing this kind of protection to women.⁹³ *Amici's* lawyers had cited this testimony as evidence of internationally accepted norms.⁹⁴

C. *Welfare Payments: Adequate Allowance for Health and Well-Being*

State courts have been receptive to human rights arguments during the past decade, prompting some scholars to suggest that state courts provide a more hospitable forum than the federal courts.⁹⁵ One noteworthy example is *Boehm v. Superior Court*,⁹⁶ a California case which championed economic rights in United States jurisprudence and raised the applicability of an international human rights instrument *sua sponte*.⁹⁷ Represented by attorneys with Fresno-Merced Counties Legal Services⁹⁸ and the Western Center for Law and Poverty,⁹⁹ welfare recipients challenged the county government's reduction of public assistance grants to a level of minimum subsistence. The plaintiffs contended that subsidies for food and shelter alone did not adequately "relieve and support" the county's indigent population as required under state law.¹⁰⁰ In a previous decision, the court had agreed that the grant reduction was arbitrary and capricious because no study was conducted to determine whether basic ne-

92. *Id.* at 285.

93. *Id.*; see also *Hearings on S. 995, supra* note 90, at 115 (statement of Wendy W. Williams).

94. *Amici* Brief, *supra* note 83, at 17 n.4.

95. This is true at least in cases where an international instrument is used as an interpretive device and not to bind courts. See Hoffman, *supra* note 5, at 61, 66-67, see also Newman, *Symposium on International Human Rights Law in State Courts*, 18 INT'L LAW. 59, 59-60 & n.3 (1984) (remarks of former California Supreme Court Justice Frank Newman); *Proceedings, supra* note 5, at 44-45 (remarks of scholar and activist Ann Fagan Ginger).

96. 178 Cal. App. 3d 494, 223 Cal. Rptr. 716 (1986).

97. *Id.* at 501, 223 Cal. Rptr. at 721.

98. This law office has since been renamed Central California Legal Services.

99. Western Center for Law and Poverty is a state support center that specializes in welfare law. The support centers are authorized under 42 U.S.C. section 2996e(a)(3). Their staff lawyers were, according to early Legal Services Director Earl Johnson, the ones "sparking the imagination" of local offices. E. JOHNSON, JR., *supra* note 2, at 177. For more on the role of national support centers in galvanizing law reform and on the infuriation it provoked in some members of Congress, see *id.* at 180-82 and B. GARTH, *supra* note 2, at 42.

100. *Boehm*, 178 Cal. App. 3d at 499, 223 Cal. Rptr. at 719.

cessities were being provided.¹⁰¹

The later opinion refers specifically to article 25 of the Universal Declaration of Human Rights in stating that "it defies common sense and all notions of human dignity" to exclude clothing, transportation, and medical care from the minimum subsistence allowance.¹⁰² Article 25 lists explicitly these items in its definition of an adequate standard of living.¹⁰³

The parties had not cited the Universal Declaration in their briefs and did not plead any claims arising under that United Nations document. Likewise, the same judge did not mention the Declaration in a prior decision on a similar issue.¹⁰⁴ However, a law journal article published the previous year may have triggered the judge's analysis.¹⁰⁵ The article criticized the failure of United States courts to constitutionally protect subsistence rights by referring to international legal norms.¹⁰⁶ The author cited the Declaration, the Covenant on Economic, Social and Cultural Rights, the OAS Charter, and the American Declaration as examples of customary international law which may be used in an equal protection analysis.¹⁰⁷ The *Boehm* court cited both the article and the Universal Declaration in its opinion.¹⁰⁸

D. Due Process on the Job: Immigrant Workers

During the mid-1980s, immigration authorities in Oregon conducted a campaign among area employers known as "Operation Cooperation."¹⁰⁹ This campaign, which predated the 1986 congressional

101. *Boehm v. Superior Court*, 163 Cal. App. 3d 447, 452, 209 Cal. Rptr. 530, 533 (1985).

102. *Boehm*, 178 Cal. App. 3d at 502, 223 Cal. Rptr. at 721.

103. Article 25(l) reads, in relevant part: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . ." Universal Declaration of Human Rights, *supra* note 24.

104. *Boehm*, 178 Cal. App. 3d at 501, 223 Cal. Rptr. at 721.

105. Good, *Freedom From Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335, 361-62 (1984).

106. Good, *supra* note 105, at 362.

107. *Id.* at 361-63.

108. *Boehm*, 178 Cal. App. 3d at 501, 223 Cal. Rptr. at 720-21.

109. See, e.g., 7 IMMIGRATION AND NATURALIZATION SERVICE, COMMISSIONER'S COMMUNIQUÉ No. 3-8 (Mar.-Aug. 1984), *quoted in* 61 INTERPRETER RELEASES 809 (1984); Materials on "Operation Cooperation" prepared by Polly A. Webber, National Immigration Project, National Lawyers Guild Skills Seminar: Immigration Raids in the Workplace (Jan. 26 & Feb. 2, 1985); Mexican American Legal Defense and Education Fund Memorandum, Los Angeles, Cal., 3 (May 1985) (on file with the Loyola of Los Angeles International and Comparative Law Journal). For more on the theory of job displacement by immigrant workers, see

legislation that required employers to verify the immigration status of their employees,¹¹⁰ attempted to convince employers not to hire anyone who could not furnish certain work authorization or immigration documents. As a result, a number of food-processing workers lost their jobs or were denied employment. To combat this campaign, the local Oregon Legal Services Corporation Office, the American Civil Liberties Union ("ACLU"), and a private attorney sued the INS in federal court for violations of due process, privacy, and administrative procedure.¹¹¹

The consulting, private attorney was interested in raising claims under international human rights law. The attorney first proposed causes of action founded on the Universal Declaration of Human Rights and the American Declaration of Human Rights that alleged that the INS's effort to discourage the employment of aliens without work authorization violated the right to work under favorable conditions.¹¹² Another proposed claim was that the INS operation violated the due process right to "a simple, brief procedure" protecting employees from infringement of their "fundamental, constitutional rights"—the right to work.¹¹³ The consulting attorney intended to argue that the Declarations authoritatively interpret United Nations and OAS Charters and that these Charters, in turn, are binding on the United States.¹¹⁴ The Oregon attorneys preferred to use the Declarations and Charters to interpret the United States Constitution and

Rosenbaum, *Safeguarding Employment for U.S. Workers: Do Undocumented Take Away Jobs?*, 9 CHICANO L. REV. 1 (1988).

110. Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.); see also 8 U.S.C. § 1324a (1988) (employer verification procedures); Rosenbaum, *supra* note 109, at 1-2 (discussing the legislative history).

111. First Amended Complaint, *Salinas-Pena v. INS* (No. CV 86-1033) (D. Or. 1988) (CLEARINGHOUSE REV. No. 42, 510) [hereinafter First Amended Complaint].

112. Article 23(1) of the Universal Declaration of Human Rights states: "[E]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." Universal Declaration of Human Rights, *supra* note 24. Article XV of the American Declaration states: "[E]very person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit." American Declaration, *supra* note 26.

113. The American Declaration, art. XVIII reads: "There should likewise be available to [every person] a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." American Declaration, *supra* note 26.

114. See, e.g., cases cited in *Domestic Application*, *supra* note 5, at 194-209; Burke, *supra* note 5, at 308-10 (stating that the United States is bound to the terms of the Charters as it is to any international treaty).

American case law.¹¹⁵

Ultimately, the plaintiff employees filed a complaint raising four claims based on due process, two based on other constitutional violations, and two generally stated claims.¹¹⁶ The legal aid lawyers had intended to rely in part on the declaratory international law in interpreting domestic due process law when briefing these claims. However, the parties settled before the claims were briefed.¹¹⁷

E. The Right of No Return: Would-Be Refugees

For many years, Salvadorans seeking asylum in the United States have faced almost certain deportation because the United States government grants asylum to only a very small percentage of applicants.¹¹⁸ Many Salvadorans have argued for *non-refoulement* as an alternative to deportations. *Non-refoulement* is an internationally recognized right not to be returned to a country where one's life or personal freedom would be threatened because of political opinion or membership in a particular social group, nationality, religion, or race.¹¹⁹

Aided by the National Center for Immigrants' Rights, ("NCIR"),¹²⁰ a Legal Services litigation support center, a Salvadoran

115. See, e.g., *Domestic Application*, *supra* note 5, at 165-90; de la Vega, *supra* note 5, at 1245; Lillich, *Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.U. L. REV. 153 (1978); Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 289, 289 n.3, 293-99, 301-02, 307; RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 702-03 (1986); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

116. First Amended Complaint, *supra* note 111, ¶¶ 6.1-4.

117. Stipulated Compromise and Motion and Order to Dismiss, *Salinas-Pena v. INS* (No. CV 86-1033) (D. Or. 1988) (CLEARINGHOUSE REV. No. 42, 510).

118. See, e.g., IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1987); EXECUTIVE OFFICE OF IMMIGRATION REVIEW, SELECTED STATISTICS ON GRANTS OF POLITICAL ASYLUM (Oct. 1, 1985-Oct. 1, 1988) (statistics for 1984-1988 released by the INS and by the federal immigration judges' office). For an overview of the administrative procedure for adjudicating asylum petitions, see Comment, *The U.S. Political Asylum Program: An Administrative Analysis*, 9 CHICAGO L. REV. 16, 30-44 (1988).

119. See, e.g., Parker, *Human Rights and Humanitarian Law*, 7 WHITTIER L. REV. 675 (1985); Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897 (1986); Hailbronner, *Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857 (1986).

120. This law firm has been renamed the Center for Human Rights & Constitutional Law, and is no longer an LSC back-up center. See *supra* note 99 and accompanying text on support centers.

refugee defense organization¹²¹ filed a petition in 1982 with the Inter-American Commission on Human Rights¹²² complaining of violations under the American Declaration and the United Nations Convention¹²³ and Protocol¹²⁴ Relating to the Status of Refugees. The petition specifically alleged violations of the following rights: the right of *non-refoulement*; the right to seek and receive asylum; the right to life, liberty, and security, and to humane treatment while in custody; special protection for mothers and children; and freedom from discrimination.¹²⁵

The petitioners requested a full, on-site investigation of INS detention facilities, including review of detainee treatment and interviews with INS officials and immigration judges.¹²⁶ Unlike the petition filed in the drownings case,¹²⁷ this petition was forwarded quickly to the United States government. The response was prompt and predictable: the case was inadmissible because the plaintiffs and causes of action in the petition were identical to those in lawsuits pending before United States courts. Petitioners countered with a legal memorandum asserting that the United States courts would not address the discriminatory nature of the asylum decisions or the impermissible *refoulement*. Rather, the courts would defer to the political branches of government on these questions. Petitioners also claimed that any domestic remedy would be ineffective; only IACHR monitoring of the *substantive*, as opposed to *procedural*, due process afforded Salvadorans would be effective.¹²⁸ During the following fifteen months, the United States urged the commission to rule on ad-

121. The defense organization involved was the International Commission for the Defense of Salvadoran Refugees, based in Washington, D.C. and Mexico.

122. Communication to the Inter-American Commission on Human Rights alleging Violations of the Human Rights of Salvadoran Refugees by the United States (Mar. 4, 1982) (Case No. 7969/United States) [hereinafter Petition].

123. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 135.

124. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

125. Petition, *supra* note 122, at 2-7. Numerous other religious and human rights organizations later signed the petition, as did other counsel including the International Human Rights Law Group, the American Civil Liberties Union, and Steptoe & Johnson, a private Washington, D.C. law firm. The complete list of petitioners includes the National Council of the Churches of Christ in the United States, the American Friends Service Committee, and the International Commission for the Defense of Salvadoran Refugees.

126. *Id.* at 22.

127. See *supra* text accompanying notes 69-76.

128. Memorandum to the Inter-American Commission on Human Rights re: Admissibility of Case 7969 (July 10, 1982) (submitted by International Commission for the Defense of

missibility, arguing that the petitioners had not even begun to pursue interim remedies available in the United States.¹²⁹ In October 1983, the IACHR President cabled the United States Secretary of State to "reiterate the principle of *non-refoulement*" and "for humanitarian reasons . . . exhort[ed] the U.S. Government to suspend deportation of all Salvadorans" while the case was under consideration.¹³⁰

The parties were still involved in the jurisdictional dispute almost one year later. The petitioners asked the IACHR to conduct a fact-finding, on-site investigation to determine admissibility. They reasoned that this was the only way the IACHR could see that the administrative adjudication process was futile. The IACHR expressed interest in conducting the on-site investigation, but the United States Department of State insisted that the IACHR could conduct an investigation only if its results were used to determine justiciability—not a finding on the merits. Apparently, that limitation was unacceptable, as the IACHR never conducted the investigation.¹³¹

Following the passage of the 1986 immigration reform bill that authorized "amnesty" for many undocumented immigrants¹³² and a 1987 Supreme Court decision that liberalized the standard for political asylum,¹³³ petitioners' counsel urged the IACHR to hold this case in abeyance, thus giving those seeking asylum a chance to bring their claims individually before the INS's administrative law judges.¹³⁴ Had petitioners pressed this issue, they would probably have faced a negative finding of fact; perhaps the suspended claim is the best they

Salvadoran Refugees, National Council of the Churches of Christ in the U.S.A., Lutheran Council in the U.S.A., and American Friends Service Committee).

129. Letters from United States Ambassador to the Organization of American States, J. William Middendorf II to Executive Secretary Edmundo Vargas Carreño (May 26, 1982 & Sept. 29, 1983); Letter from Deputy United States Representative Thomas J. Dunnigan to Edmundo Vargas Carreño (May 11, 1984) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

130. Cable from IACHR President César Sepúlveda to United States Secretary of State George Schultz (Oct. 6, 1983). This cable was an extraordinary step that uncharacteristically preceded any decision on admissibility.

131. Telephone interview with Attorney Anthony LaRocca of Steptoe & Johnson (Mar. 9, 1990).

132. 8 U.S.C. §§ 1160, 1255a.

133. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). For a discussion of this case and the criteria to be applied in refugee status cases, see Anker & Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 67 (1989); Helton, *INS v. Cardoza-Fonseca: The Decision and Its Implications*, 16 REV. L. & SOC. CHANGE 35 (1987-88).

134. Telephone interview with Attorney Anthony LaRocca of Steptoe & Johnson (Mar. 9, 1990).

could have achieved.¹³⁵

*F. Language and Culture: Minority Access to Education,
Government, and Services*

In recent years, "English-only" initiatives have appeared more frequently on state and local ballots. These initiatives seek to affirm English as the official language of a particular state or locality.¹³⁶ California's "English-only" initiative, "Proposition 63,"¹³⁷ adopted as a constitutional amendment, is significant because of the state's large immigrant population, its diversity of linguistic minorities, and many publicly-financed bilingual services.¹³⁸

Groups were forming to oppose Proposition 63 well before its adoption by popular referendum in 1986. Counsel for these groups include Legal Services of Northern California, the Legal Aid Society of San Francisco, the Mexican-American Legal Defense and Education Fund ("MALDEF"), and two ACLU affiliates. Presently, these lawyers have a potential cause but no actions pending. Due to the amendment's ambiguity, both sides are unsure of what to do next. On

135. *But see* Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, 5036 (adding § 244A to the Immigration & Nationality Act, to be codified at 8 U.S.C. —) (congressional creation of a "temporary protected status" or "safe haven" for Salvadorans living in the United States); *American Baptist Churches v. Thornburgh*, Civ. No. 85-3255 (N.D. Cal. Settlement Order Jan. 31, 1991) summarized in 68 INTERPRETER RELEASES 118, 127 (1991) (requiring readjudication of claims of approximately 500,000 Salvadoran and Guatemalan asylum applicants, under new INS regulations).

136. *See, e.g.*, CAL. CONST. art. III, § 6; ILL. ANN. STAT. ch. 1, ¶ 3005 (Smith-Hurd 1980); IND. CODE ANN. § 1-2-10-1 (Burns Supp. 1988); KY. REV. STAT. ANN. § 446.060 (Michie/Bobbs-Merrill 1985); VA. CODE ANN. § 22.1 (1985); *see also* Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657 nn.1, 2 (1987); Los Altos, Cal., City Council Resolution 85-86 (Dec. 17, 1985); DADE COUNTY, FLA. ORDINANCE No. 80-128 (1980) (prohibiting expenditure of county funds for purposes of utilizing any language other than English or promoting any culture "other than that of the United States," requiring that government meetings and publications be in English only); Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 294 (1989); *but see* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

137. Proposition 63 was adopted as a constitutional amendment by California voters in 1986. CAL. CONST., art. III, § 6.

138. *E.g.*, CAL. EDUC. CODE § 52540 (West 1989) (English classes for adults); CAL. CONST., art. I, § 14 (requiring interpreters in criminal courts, if needed); CAL. EVID. CODE § 752 (West 1989) (interpreters provided for witnesses); CAL. LAB. CODE § 105 (West 1989) (providing interpreters in hearings before the Labor Commission, if needed); CAL. GOV'T CODE § 7295.2 (West 1980) (state agencies required to provide informational materials in non-English languages); CAL. WELF. & INST. CODE § 18915 (West 1980) (requiring applications for food stamps to be in Spanish as well as English); CAL. UNEMP. INS. CODE § 316 (West 1986) (requiring all standard information employee pamphlets regarding unemployment and disability insurance programs to be in Spanish and English).

its face, the amendment requires enabling legislation to give effect to its mandate that the legislature "insure that the role of English as the common language of the State of California is preserved and enhanced," not "diminishe[d] or ignore[d]." ¹³⁹

Opponents of the proposition are considering traditional theories such as violation of equal protection, freedom of expression, and fundamental rights guaranteed under the state and federal constitutions,¹⁴⁰ in addition to the more unconventional theories that Proposition 63 contravenes provisions of various international instruments.¹⁴¹ The "Proposition 63 Legal Team" is debating theories of opposition and has not decided yet whether the international violations should be raised directly, whether international law should be used to interpret domestic statutes and constitutional law, or whether international law should even be invoked in the lawsuit at all. If international law is to be invoked, it is unclear whether it will be invoked on behalf of plaintiffs, defendants, intervenors, or friends of the court.

A more daring strategy, not yet discussed by the team, is to submit a communication to UNESCO's Committee on Conventions and Recommendations, under the Decision 3.3 procedures.¹⁴² The communication would allege that Proposition 63 violates United Nations instruments by negatively affecting schoolchildren in bilingual classrooms and voters needing bilingual election materials. These violations concern education, culture, and information, the "fields of

139. CAL. CONST. art. III, § 6(c). See *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1044 (9th Cir. 1988) *vacated*, 490 U.S. 1016 (1989) (court of appeals refusing to enforce an English only rule in a public workplace and referring to the amendment as "primarily a symbolic statement" on preserving and strengthening the English language).

140. See Note, *supra* note 136, at 668-81 (discussing United States constitutional theories); see also *Yniguez v. Mofford*, 730 F. Supp. 309, 317 (D. Ariz. 1990) (holding that article of the Arizona Constitution making English the official state language is invalid on its face because it violates the First Amendment of the United States Constitution).

141. E.g., U.N. CHARTER arts. 55, 56; Universal Declaration of Human Rights, *supra* note 24, arts. 26(1), 27(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 23, art. 13(2)(c); International Covenant on Civil and Political Rights, *supra* note 25; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 4, 1969, 660 U.N.T.S. 195; the Convention against Discrimination in Education (UNESCO), arts. 3, 5, Dec. 14, 1960, *reprinted in* UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982 59 (1984); for resolutions on the rights of migrant workers and their families, see texts cited in Rosenbaum, *Educating Children of Immigrant Workers: Language Policies in France and the U.S.A.*, 19 AM. J. COMP. L. 429, 430-31 nn.9-11, 13 & 14; U.N. Doc. E/CN.4/1986/WG.5/WP.1 (1986); U.N. Doc. E/CN.4/1983/66 (1983) (reports and proposals of the Commission on Human Rights' Informal Open-ended Working Group set up to draft a "declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities.").

142. UNESCO Executive Board Doc. 104 EX/Dec. 3.3.

competence" associated with UNESCO. The fact that the United States is no longer a member of UNESCO does not bar a claim against the State of California or the United States government.

VI. THE VALUE OF APPLYING INTERNATIONAL NORMS AND PROCEDURES—AND SOME CAVEATS

The use of international human rights law or procedure in any particular case may not, by itself, make the difference between a favorable or unfavorable decision for poor people. However, cases rarely stand or fall solely on the basis of one legal principle. Sometimes, the inclusion of human rights citations or the filing of a petition in an international forum may be enough to tip the scales in the claimant's favor. Despite the potential advantages, however, care is essential when utilizing international human rights norms and procedures. Clients, courts, and the Legal Services Corporation may all look askance at international human rights law initiatives, and such initiatives can backfire if they are overly broad or filed prematurely.

A. *Publicity Value*

One of the most effective uses of international human rights law is as a mechanism for generating publicity. The novelty of the international perspective appeals to the media, particularly when a case has been raised in an international forum. The media impact on resolving cases cannot be underestimated.

For example, the press conference and subsequent news coverage regarding the IACHR petition on behalf of drowned immigrant workers¹⁴³ may have motivated an influential bishop and the Mexican Consul to take a position against INS tactics. This created pressure on the INS's local border patrol unit chief to meet with community activists and subsequently order his agents to carry lifesaving equipment.

Media coverage of the proceedings themselves can also benefit claimants. A newspaper article about an OAS on-site investigation of detention facilities or the remarks of an NGO intervenor at the Sub-Commission can bring an otherwise overlooked matter to the attention of those who shape opinion and make policy.¹⁴⁴ Publicity may

143. See *supra* text accompanying notes 55-71.

144. See Shelton, *Utilization of Fact-Finding Missions to Promote and Protect Human Rights: The Chile Case*, 2 HUM. RTS. L.J. 1, 35-36 (1981); Norris, *supra* note 37, at 753 (effects of publicity on improvement of the human rights situation).

ultimately persuade or shame¹⁴⁵ governments into taking steps to resolve a particular case.

B. Promulgating Novel Theories and Fresh Approaches

United States legal scholars and practitioners often ignore the existence of international legislation and jurisprudence. A number of concepts in treaties and conventions are potentially more generous than the language contained in parallel clauses of the United States and state constitutions and statutes. These concepts could be used to enhance the body of United States law.

For example, in the "Operation Cooperation" matter, the Oregon attorneys wanted to promote an immigrant's right to work.¹⁴⁶ Federal and state bills of rights and case law do not state as strongly the importance of this liberty as do the United Nations Declaration of Human Rights, the International Covenants and their OAS counterparts.¹⁴⁷ Although the lawyers decided to frame their claims as due process violations, they reserved the option in subsequent briefs to cite United Nations or inter-American instruments. Those instruments are usually clearer with regard to judicial access and procedural protection than the "due process" provisions of federal and state constitutions. Similarly, the coalition opposing California's English-only constitutional amendment may draw upon helpful language in the United Nations Charter or UNESCO resolutions that promotes linguistic, cultural, and educational rights to supplement domestic sources of law.¹⁴⁸

Human rights advocates may breathe new life into old concepts. When the LASAC addressed the United Nations Sub-Commission regarding migrant rights, it compared the detention phenomenon to a "slavery-like" practice.¹⁴⁹ Thus, the lawyers could address the question under an existing agenda item and give new meaning and relevance to the term "slavery" in today's world. Although the

145. Professor Emeritus Frank Newman must be credited for coining the phrase "mobilization of shame."

146. See *supra* text accompanying notes 109-17.

147. An example of such a statement is the anti-discrimination clause in the American Convention on Human Rights. See Norris & Reiton, *The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties*, 30 AM. U.L. REV. 189, 203-07 (1981).

148. See *supra* text accompanying notes 136-42.

149. On detention and slavery-like practices, see Weissbrodt, *Current Developments: The 1981 Session of the Subcommission on Prevention of Discrimination and Protection of Minorities*, 76 AM. J. INT'L L. 405, 409-10 (1982).

attorneys' intervention did not result in any concrete action by the Sub-Commission,¹⁵⁰ one should not overlook the indirect effects. The NGO may have influenced the General Assembly drafters and State Department officials. The General Assembly articulated its concerns about migrant workers in a proposed convention¹⁵¹ and the State Department may have discreetly asked its counterparts in other departments of the executive branch to look into the INS's raids and treatment of apprehended migrants.

CRLA also tried to attract the attention of the international human rights community to the plight of migrants by attributing a broader meaning to an existing term.¹⁵² The ERC hoped to enlist the aid of Amnesty International in its dispute with United States immigration authorities. By characterizing the round-up of immigrants as "detention," the Amnesty Secretariat found the claim to be too broad for direct action, but encouraged the complainant to continue sending evidence of brutality and mistreatment.¹⁵³

Advocates for the poor have also won procedural victories. These victories may lead to substantive gains for both present and future plaintiffs. When the minority rights organization petitioned the Inter-American Commission about the continuing drownings, referral to a rapporteur may have seemed an insignificant step—or even an indirect death sentence. Although the petitioner eventually lost on the merits of its complaint, the assignment of a rapporteur kept the question alive for several commission sessions and compelled the United States government to answer.¹⁵⁴

More dramatically, the NGOs who sought the commission's help in protecting Salvadoran asylum applicants obtained a response from the IACHR even before a ruling on exhaustion was made. The commission President sent a cable to the United States Secretary of State asking that deportation of Salvadorans living in the United States be suspended.¹⁵⁵

Most attorneys are comfortable with the concept of expanding the limits of the law. This is particularly important for poverty lawyers and international human rights proponents. Because their clients

150. See *supra* text accompanying notes 63-68.

151. See *Proceedings, supra* note 5, at 65 (comments of Michael Posner on the United States' defense of its positions at the United Nations).

152. See *supra* text accompanying notes 59-60, 70.

153. See *supra* text accompanying notes 61-62.

154. *Id.*

155. See *supra* text accompanying note 130.

and their objectives are so far from the mainstream, their interests can only be advanced by evolution of notions of justice and fairness.

C. *Spreading the Word on Human Rights*

Poor people's advocates and NGOs are concerned both with expanding ideas and extending their audience. They target fellow lawyers, decision-makers, and the general public. In reaching these people, the medium is as important as the message.

For example, consider the effect of an *amicus curiae* brief that addresses human rights issues. *Amici* often have broader objectives than those of the parties, and all parties may not see eye-to-eye regarding the questions to be raised on appeal. Having a friend of the court as a messenger at least ensures that the message will be delivered. The *amicus* brief also allows human rights issues to be argued even when the issues were not raised in the lower court. Lastly, the *amicus* brief can educate judges about unorthodox theories without distracting from or "discrediting" more conventional arguments made by the parties on their own behalf.

The *amicus* brief filed on behalf of the respondents in *Boehm* illustrates this usage.¹⁵⁶ The weight that the Supreme Court gave to the legal aid society and HRA's brief may have been far greater than a single footnote reveals. Perhaps one justice or even one law clerk read the brief closely and considered the international norms or treaty obligations on protections for working mothers. This, in turn, may have strengthened respondents' arguments on behalf of the contested statute. Education of the judiciary is an ongoing process; it does not always necessarily manifest itself in written decisions.

Moreover, precedents are built as much from footnotes and parenthetical remarks as from textual commentary. References to the Universal Declaration of Human Rights in *Boehm* were a small but important contribution to the emerging state court human rights jurisprudence.¹⁵⁷ It does not matter that the court invoked the Declaration *sua sponte*. Judges, no less than advocates, have the opportunity to educate their peers on the bench about international standards.¹⁵⁸

156. See *supra* text accompanying notes 83-94.

157. See *supra* text accompanying notes 93-94.

158. See also *Lipscomb v. Simmons*, 884 F.2d 1242, 1244 n.1 (9th Cir. 1989) (court *sua sponte* noting that the right to associate with family members is recognized under the Universal Declaration of Human Rights, the International Covenants, and the American Convention); but see Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary Inter-*

Briefs and opinions are not the only vehicles of communication. Comments made outside the courtroom may also be influential. For example, the serious consideration of international human rights doctrine by the English-only legal team can be explained in part by the direct participation of attorneys who have pioneered this area of the law.¹⁵⁹ Likewise, California's Attorney General lent support to this idea when he alluded to possible preemption of the new constitutional amendment by a nineteenth century treaty between the United States and Mexico.¹⁶⁰ Reference to the treaty supports the idea that an international treaty may have an effect on California law.¹⁶¹

Although the benefit to clients may be indirect, there is some value in increasing the general public's understanding of international human rights standards. When the ERC approached Legal Assistance about requesting the aid of Amnesty International in ending the drownings of migrant workers, its leaders had some rudimentary understanding of international human rights machinery and of Amnesty International itself.¹⁶² The appeal to Amnesty was not entirely misplaced. Ultimately the lawyer's task is to take the client's broad objective, frame it in the proper legal terms, and convey it to an appropriate forum, thereby publicizing a human rights violation in the international community.

Once its petition was filed, the ERC, like the Salvadoran refugee groups who petitioned the Inter-American Commission for *non-*

national Law of Human Rights in the United States Courts, 4 HOUS. J. INT'L L. 59, 62-63 (1981) (counseling judges to be cautious, lest they become "human rights activists" thwarting the development of human rights law in the United States).

159. See *supra* text accompanying notes 138-41.

160. Telephone interview with Deputy Attorney General and Chief Press Information Officer Alan Ashby, Aug. 4, 1989. Mr. Ashby indicated that Attorney General John Van de Kamp may have responded to a radio interviewer's question on this subject during the Proposition 63 campaign, although he did not endorse the treaty's applicability to the amendment. In fact, in 1961, the California Attorney General concluded that the treaty had no effect on the then-current state constitutional provision that voters be able to read and write in English. See Letter from Attorney General Stanley Mosk to Assembly Member James R. Mills, Aug. 23, 1961 (on file with the Loyola of Los Angeles International and Comparative Law Journal). The Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, 9 Stat. 922, T.I.A.S. No. 207, ended the war between Mexico and its northern neighbor. The treaty ceded California and New Mexico to the United States and allowed Mexicans in the ceded territory to choose United States or Mexican citizenship. Those who became United States citizens were to "be maintained and protected in the free enjoyment of their liberty and property, and . . . religion without restriction." *Id.* art. IX.

161. See also *Proceedings*, *supra* note 5, at 44-45 (remarks by Ann Fagan Ginger regarding the introduction of bar resolutions and city ordinances as a way to educate lawyers and policy-makers on international human rights law).

162. See *supra* text accompanying notes 57-60.

refoulement,¹⁶³ was thrust into the media spotlight. The organizations thus gained more support among their members and from the grassroots communities in which they operate. This celebrity status may also stimulate greater public interest in the cases before the commission and in their doctrinal underpinnings of international law and procedures. This popularization should complement efforts to speak and write to legal professionals who are more closely tied to the forums where these cases are considered.

D. Convincing Colleagues

Advocates desiring to use an international law approach may face opposition from their own colleagues who may be biased in favor of the Anglo-American legal system. Well-meaning lawyers often disagree over legal strategy or theory.¹⁶⁴ For example, the Oregon Legal Services attorneys combatting "Operation Cooperation" were receptive to the idea of citing supportive international human rights law, but they preferred a more traditional approach than the one suggested by the consulting attorney.¹⁶⁵ They instead adopted the method offered by former Oregon Supreme Court Justice Hans Linde in a previously published law journal symposium.¹⁶⁶ This method utilized provisions of international instruments to assist in interpreting the United States Constitution.¹⁶⁷

Fellow attorneys also may misunderstand or be unreceptive to unconventional alternatives. When the California legal services lawyer filed his petition on behalf of migrant farm workers with the OAS,¹⁶⁸ he urged his colleagues to raise inter-American human rights claims in their related federal court complaint.¹⁶⁹ Although the complaint was amended later on other grounds, the attorneys were not interested in adding causes of action arising under international

163. See *supra* text accompanying notes 120-26.

164. See *Proceedings, supra* note 5, at 54 (Hurst Hannum's comments on the wide range of interests and the lack of coordination among human rights activists).

165. See *supra* text accompanying notes 112-15.

166. Linde, *Comments, Symposium on International Human Rights Law in State Courts*, 18 INT'L LAW. 77, 80-81 (1984).

167. In *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), Justice Linde, writing for the majority, cited the United Nations instruments and regional conventions in upholding a prisoner's right to humane treatment. *Id.* at 622 n.21, 625 P.2d at 131.

168. See *supra* text accompanying note 69.

169. See complaint and amended complaints in *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 674 F. Supp. 547 (N.D. Cal. 1987), *cont'd sub nom*, *Pearl Meadows Mushroom Farm v. Nelson* (No. C 82-1896).

human rights law or using that law to support their causes of action. This may have resulted as much from inertia and professional etiquette as from principled disagreement: the ERC's attorney did not aggressively "lobby" his colleagues who were working on a separate case and the lawyers in the federal court case lacked sufficient time and incentive to learn a new area of law in the midst of litigation.

Plaintiffs' counsel in the *Boehm* cases did not raise international law in support of their claims for subsistence benefits.¹⁷⁰ Perhaps the counsel was reluctant to ask the court to recognize a right that does not fit neatly into the matrices of freedoms and protections sanctioned by United States courts. Alternatively, the litigators may simply have been unfamiliar with the international instruments that promote economic rights.

It also may be difficult to convince fellow advocates to try new forums. Many attorneys perceive the international and regional bodies as distant, politicized, nonlegal, and foreign.¹⁷¹ Co-counsel may think it unwise to take a matter to the Sub-Commission at a time when the General Assembly is squeezing its budget, or to utilize the UNESCO communications procedures when the United States is no longer a member and many Americans have condemned the organization for "undemocratic" policies, mismanagement, and Third World leanings.

This is not to say that attorneys who advise against the use of international arguments or forums are ill-intentioned or lazy. Serious discussions, as well as sincere disagreement, can take place with fellow counsel.¹⁷² Resistance to change underscores the need for more

170. See *supra* text accompanying 100-04.

171. Unfamiliarity may even breed a mild form of contempt. One of the lawyers working with the English-only team, see *supra* text accompanying notes 139-42, who is a very experienced litigator in the area of language rights, dismissed arguments based on United Nations law as appropriate only for the International Court of Justice. But see Yudof, *International Human Rights and School Desegregation in the United States*, 15 TEX. INT'L L.J. 1, 41-45 (1980) (views of one United States law professor on the possible effect United States ratification of the UNESCO racial discrimination convention would have on school desegregation in this country).

Litigation strategies used to challenge the Texas law requiring undocumented children to pay tuition to attend public schools illustrate the different approaches to the use of international human rights doctrines. Compare *In re Alien Children Litigation*, 501 F. Supp. 544, 589-96 (S.D. Tex. 1980) (invoking OAS instruments) with *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978) (relying on the United States Constitution).

172. One CRLA attorney was recently receptive to the idea of pursuing a claim before the ILO or IACHR for better wages and working conditions for shepherds after his clients lost their bid for minimum labor standards before a state administrative agency. See *In re Orihuela*, Pet'n No. G 90-1 (California Industrial Welfare Commission Jan. 18, 1991) (deci-

education and training within private firms and the greater Legal Services community.

E. Not Reaching the Clients

Critics have charged that legal aid lawyers use their clients to achieve their own political and social goals.¹⁷³ The "paper plaintiff" phenomenon, that is, the litigant who exists only on the pleadings but has no real contact with counsel, may be more prevalent than legal aid lawyers care to admit.¹⁷⁴ Losing one's clients or losing sight of their objectives is also a real risk to the legal aid advocate.

As arcane as domestic law may seem to a layperson, international law is even more difficult to comprehend. By its very nature, it involves foreign words, foreign places, and foreign concepts. It may be too remote and intellectual for the indigent and parochial client to fully understand and appreciate. For example, despite the end result of the complaint to the Inter-American Commission on behalf of California migrant farm workers,¹⁷⁵ some ERC members requested their attorney to file a new petition following the drowning of another farm worker nearly one year after the original case was dismissed.¹⁷⁶ Apparently, the members had not fully understood the significance of the previous denial of admissibility.¹⁷⁷ However, despite the intellectual difficulty, clients may still be enthusiastic about attempting results through international means.

There are always communication gaps between lawyer and client, but that is not an insurmountable problem. The danger lies more

sion denying request for reconsideration) (on file with the Loyola of Los Angeles International and Comparative Law Journal).

173. See, e.g., Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1150 (1970) (views of the California Bar Association Board of Governors after a request from the OEO to fund CRLA to the effect that CRLA is "a social experiment" which required the bar to "take sides in an economic struggle still pending"); see also Agnew, *What's Wrong with the Legal Services Program?*, 58 A.B.A. J. 930 (1972); Phillips, *Legal Services and the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 355, 355-56 (1985).

174. On the paper plaintiff phenomenon, see J. HANDLER, *supra* note 29, at 80, 161-62, 193.

175. See *supra* text accompanying notes 79-81.

176. See *Teen Fleeing Raid Drowns*, Fresno Bee, Aug. 12, 1986, at B1, col. 1; *Youth's Drowning Probed by Local Civil Rights Group*, Merced Sun-Star, Aug. 13, 1986.

177. However, the members' persistence in making public complaints about the death of migrant workers in INS custody eventually led to a 1990 congressional hearing on border violence against immigrants. See *Premian a noticiero latino por informar sobre injusticia a compesino*, SEMILLA, Feb. 1991, at 9.

in the attorney's failure to understand the client's needs.¹⁷⁸ Arguably, the legal aid lawyer's job is to help people escape or minimize poverty and empower themselves in the process.¹⁷⁹ The lawyer's enthusiasm for using international law solutions should not detract from that basic goal.

F. Political Fallout

A lawyer's use of international law solutions comes at a price. Legal Services attorneys are responsible not only to their clients, but also must answer to the LSC. In recent years, LCS' Office of Monitoring, Audit and Compliance¹⁸⁰ has closely examined some of the unorthodox work performed by its affiliated law offices.¹⁸¹

For example, when a monitoring team visited CRLA in 1985, the staff attorney who filed the OAS complaint was asked why the matter was taken to the OAS and why the client organization could not hire its own lawyer. The attorney responded that the Inter-American Commission petition was one of a number of legal vehicles utilized and that the client was eligible under the assistance guidelines. Further, the attorney cited to the listing of the International Human Rights Law Group under the heading of "Specialized Litigation and Support Centers" on the inside cover in the latest issue of a publication widely distributed to Legal Services staff.¹⁸² He interpreted this

178. CRLA founder and first director James Lorenz remarked that if organizing poor people is the ultimate goal, then law reform cases can undercut organizing. "When the lawyer is a necessary player in the game, he may well end up in center stage, with the people he is representing relegated to the background . . ." Comment, *supra* note 173, at 1079 n.19; see also E. JOHNSON, JR., *supra* note 2, at 249 (redistribution of power to the poor).

179. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

180. There is no reference to this office in the Legal Services Act, although the LSC is authorized to audit legal services offices and require reports. See 42 U.S.C. § 2996(g) (1988). The monitoring office is mentioned only indirectly in the regulations. 45 C.F.R. § 1612.12(c)(3) (1989).

181. See, e.g., *Legal Services Corp.: Monitoring and Investigations, Oversight Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Multnomah Legal Services Union v. Multnomah Co. Legal Aid Service*, 723 F. Supp. 1398, 1401, 1405-07 (D. Or. 1989) (congressional criticisms of LSC monitoring practices); Roche, *What's Really Happening With LSC Monitoring?*, 21 CLEARINGHOUSE REV. 10 (1987); *Legal Services Corp. Seeks Personnel Files*, Daily J., Feb. 21, 1991, at 5; *Legal Services Audits Assailed as "Witch Hunt,"* Wash. Post, Nov. 30, 1985; *Federal Audits of Legal Aid at Issue*, N.Y. Times, Nov. 18, 1985.

182. *Clearinghouse Review*, published by the National Clearinghouse for Legal Services for approximately two decades, previously included the International Human Rights Law Group in its list of support centers. See, e.g., 19 CLEARINGHOUSE REV. No. 6 (Oct. 1985) (inside cover). More recently, the *Review* published an article devoted to the use of international human rights law by Legal Services practitioners. See de la Vega, *supra* note 5. The *Review* is

to be the Corporation's unofficial approval of the use of international human rights law. In its written report, the monitoring team noted both the international petition and the immigration subject matter.¹⁸³ No disciplinary action, however, was taken against CRLA.

Undertaking claims based on international human rights law is not *per se* controversial. Nevertheless, legal aid staff whose work involves heavily regulated areas such as group representation, immigrant assistance, suits against government, and lobbying should be prepared to defend their cases before Legal Services bureaucrats and public officials alike. As one poor people's advocate observed just before the formation of the LSC, the more successful poverty lawyers are, the more likely it is that the government will try to eliminate their jobs.¹⁸⁴

G. Premature or Overly-Broad Claims

International avenues should be explored when they maximize the chances of vindicating a client's rights. However, the all-too-frequent response from the opposing government in international forums is that the moving party has failed to exhaust domestic remedies. The United States government used this strategy effectively in the drowned migrant worker cases before the Inter-American Commission.¹⁸⁵ The United States representative's written communiqué was filled with citations to cases pending in domestic courts that often were identical to actions lodged with the IACHR. Petitioners tried to distinguish these cases by asserting that the relief sought from the international forum was broader, as in the *non-refoulement* case,¹⁸⁶ and that the final judgments in the United States litigation were unduly delayed, as in the drowning petition. Still, attorneys should pause before rushing to file claims before international forums. At a minimum, one should consider the possible ramifications before filing pleadings with the *same* parties and *identical* issues in two forums. Even though attorneys should consider all possible alternatives, si-

authorized under 42 U.S.C. § 2996(a)(3)(C) to "stimulate[] law reform by providing lawyers ready access to the ideas and professional work of innovative attorneys elsewhere in the nation." E. JOHNSON, JR., *supra* note 2, at 177.

183. Legal Services Corporation, Draft Monitoring Report on California Rural Legal Assistance, Oct. 7-18, 1985, at 58 (on file with the author, University of California School of Law (Boalt Hall), Berkeley, California, 94720).

184. Wexler, *supra* note 179, at 1051.

185. See *supra* text accompanying notes 73-78.

186. See *supra* text accompanying notes 77, 128-30.

multaneous litigation in different forums may not be in the client's best interest.

When addressing complaints to international rights tribunals, it is more effective to rely on a few clear violations rather than the "shotgun" technique of stating every possible cause of action, regardless of its strength. The petitioners at the IACHR recognized this when submitting their final briefs on the drowning of migrant workers. Consequently, they limited their petition to violations of the substantive rights to life and personal security. The petitioners also confined their answer to the government's exhaustion of domestic remedies argument to a rebuttal relating to delays in domestic judicial remedies. Lawyers also should write concisely and avoid legal jargon. The lead counsel for the Salvadoran refugees, for example, adopted a nonlegalistic, informal style to emphasize his client's message.¹⁸⁷ Finally, recourse to international forums should not be undertaken lightly. The dramatic effect can easily become *melo* dramatic.¹⁸⁸

Human rights claims should be used sparingly in domestic pleadings. It is a bold step even to cite regional or international accords or resolutions as applicable authority in the United States. One should temper that boldness by insuring that the citations are consistent and orderly and by avoiding ambiguous words capable of expansive interpretation beyond their customary meaning. For example, the food-processing workers' attorneys framed their causes of action in terms of traditional constitutional due process violations and left references to the American Declaration for the briefing stage. Even then, the attorneys did not intend to rely on the Declaration as the plaintiffs' sole authority.

VI. CONCLUSION

The general advantages and disadvantages of using international law and procedures have been amply noted. There are other considerations for the practitioner that do not fit into these broad categories. For example, lawyers should understand that there are few formalized precedents or clearly enunciated principles in the international petition system. Although trained to operate within boundaries and normally guided by established authorities, attorneys may welcome the opportunity to make bold arguments without the risk of binding suc-

187. Telephone interview with Attorney Anthony LaRocca of Steptoe & Johnson, May 11, 1987.

188. See *supra* text accompanying notes 171-72.

cessors with "bad law." The same is true of confidential proceedings: the advocate has little influence over the examiner's review of the case but may rely on an expert's dispassionate analysis or a government appointee's political sensibilities to gain a favorable result for the client.

Attorneys operating in the more familiar territory of domestic courts must be aware of the intrinsically conservative nature of their profession. When exploring new avenues, they have a duty not only to their immediate client but also to colleagues and future clients who seek to make new law. While this may be no different from the unwritten operating code adopted by attorneys in other matters, it bears noting that credibility and integrity are on the line when the words "international" or "human rights" are used.

Notwithstanding caveats to proceed cautiously, the poverty lawyer must not avoid the unconventional and uncertain. The desire to experiment and forge new legal principles should be balanced by an awareness that the ultimate goal is to achieve the client's goals, utilizing the best available tools. International human rights law is one tool in the lawyer's workshop; the legal aid artisan should not be afraid to use it, but must exercise due care.

